IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 00-091

STATE OF MONTANA,

Plaintiff and Respondent,

v.

RUSSELL GARNER,

Defendant and Appellant.

BRIEF OF RESPONDENT

On Appeal from the Montana Eighth Judicial District Court, Cascade County,
The Honorable Kenneth R. Neill, Presiding

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STATEMENT OF THE ISSUES

1. Was the district court correct when it denied the motion to withdraw the guilty pleas filed by the Appellant?

2. Was the Appellant's motion to withdraw his guilty plea a critical stage of these proceedings?

STATEMENT OF THE CASE

On June 16, 1995, an Information was filed with the clerk of the Eighth Judicial District Court jointly charging Russell Garner [Garner] and Steven Lee Newhouse with theft, a felony, in violation of Mont. Code Ann. § 45-6-302(1)(a) (1993). Garner was also charged with forgery, a felony, in violation of Mont. Code Ann. § 45-60-325(1) (1993). Both crimes were alleged to have occurred on May 30, 1995. (D.C. Doc. 2.) Larry LaFountain was appointed as Garner's counsel and, on June 27, 1995, entered not guilty pleas to both charges. (D.C. Doc. 4.) Trial began on November 29, 1995. Garner pled guilty to both charges on November 30, 1995. (Mins., filed between D.C. Docs. 20 & 21 and between 24A & 25; D.C. Doc. 26, Order.) A presentence investigation was filed on December 29, 1995 (D.C. Doc. 30), and Garner was sentenced on January 29, 1996.

Through counsel, Garner filed a motion to correct the sentence because the State served the notice, as required by Mont. Code Ann. § 46-13-110(g), twenty-four days after the omnibus hearing. (D.C. Doc. 40.) The presiding judge required a petition for postconviction relief, which was filed on September 23, 1996. (D.C. Doc. 52.) On January 21, 1998, the court denied the petition, finding no prejudice to Garner. (D.C. Doc. 71.)

On November 5, 1998, Garner himself filed a Notice of Appeal, a motion for the appointment of an attorney, and a "motion to take out of time appeal." (D.C. Docs. 74, 75, 76.) On December 8, 1998, this Court remanded the matter to the district court to determine what advice, if any, Garner received on his right to appeal. (D.C. Doc. 77.) Following a hearing, at which Garner was represented by counsel, the district court found that Garner's postconviction counsel had timely advised him on his right to appeal. (D.C. Doc. 90.) Garner's appellate counsel withdrew on July 26, 1999. (D.C. Doc. 93.)

On November 15, 1999, Garner filed a motion to withdraw his guilty pleas, along with an accompanying brief and affidavit. (D.C. Docs. 103, 104, 105; Respt's Apps. A, B, C, respectively.) On November 30, 1999, this Court denied Garner's motion to take an "out-of-time" appeal, upholding the district court's finding that Garner's counsel had advised Garner in a timely manner of his right to

appeal. (D.C. Doc. 108.) The district court entered an order on January 25, 2000, denying Garner's motion to withdraw his guilty pleas. (D.C. Doc. 111; Respt's App. D.) Garner appealed on February 8, 2000. (D.C. Doc. 115.)

STATEMENT OF THE FACTS

The substance of the theft charge against both Garner and Newhouse was that the pickup was stolen, as was the check Garner submitted to the EZ Money check cashing service. Garner was the sole defendant on the forgery charge. (D.C. Doc. 1.) He was at that time on parole from Montana State Prison for several earlier felonies. (D.C. Doc. 30.)

Garner's trial began on November 29, 1995, with LaFountain representing him. The prosecutor's opening statement named several employees of EZ Money who would identify Garner as the man who signed a check made out to a George Frost. She said that Frost would appear to testify that his check had been stolen and that no one had his permission to sign it for him. The employees had taken a photograph of Garner and had videotaped the transaction in which he passed the check. She also discussed the officers who had captured Garner after he fled EZ Money and who apprehended Newhouse while he was driving the stolen pickup. She said that the pickup's owner would confirm the pickup had

been stolen and that neither Garner nor Newhouse had his permission to use it. (Tr. I at 1-12.)

LaFountain told the jury that Garner had ridden in the pickup, but that Newhouse had stolen it. Garner had met Newhouse at a rest stop near Bozeman while Garner was hitchhiking, having left home because of marital problems. After travelling together to Great Falls, Newhouse gave Garner a check and asked him to cash it, agreeing to give him $50 from the approximately $1,000 Garner would receive for the check. Garner was intimidated and still distraught from his marital problems. Garner had nothing to do with the theft of the pickup, and he abandoned the attempt to pass the check before he received money for it. (Tr. I at 11-19.)

The State then proceeded with its witnesses. It called George Frost, the owner of the check that Garner presented to EZ Money. (Tr. I at 20-25.) Mandy Stevenson, the EZ Money employee Garner first approached, then testified. Garner had told her that he and his wife had been floating the river, that their pickup had broken down, they were stranded, and he needed to cash the check to fix the pickup. His identification had been stolen. Stevenson identified Frost's check, and she identified the card that she gave to Garner to fill out. She became suspicious when Garner entered a social security number different from the one on Frost's check. Garner signed the check as Frost (Tr. I at 28), and she

then took the check to her manager, who called Frost. When Stevenson returned, she spoke with Garner for five or ten minutes. The store's video monitoring equipment was turned on and an employee photographed Garner. Stevenson watched Garner leave the store. The police officers then came and were given the videotape and the photograph. (Tr. I at 26-49.)

LaFountain cross-examined both Frost and Stevenson. With Stevenson, LaFountain objected to the introduction of the videotape into evidence, and there was an extensive voir dire on the foundation for the tape, both in chambers and before the jury. (Tr. I at 39-59.)

Susan Babbitt, the general manager of EZ Money, confirmed Stevenson's testimony. She turned on the video camera and wrote down the pickup's license plate number after calling a store across the street to have them look at it. She telephoned George Frost and spoke with him, determining that his check was missing and that the amount matched the one submitted by Garner. She had Stevenson call the police and had another teller take a photograph of Garner. She saw Garner leave the building, and then saw a pickup leave. She identified Garner from the videotape and the photograph. (Tr. I at 59-72.) Julie Burns, the second teller, confirmed Babbitt and Stevenson's testimony. She was able to identify Garner from memory because she had seen him when he was in the EZ Money

building, and she had taken the Polaroid photograph of him. She, too, saw Garner leave the building and saw a pickup leave. (Tr. I at 72-91.) Burns was followed by Lloyd Holland, the owner of the pickup, who said the pickup had been taken and neither Garner nor Newhouse had his permission to use it. LaFountain established that Holland's truck had been missing for ten days before the incident at EZ Money and that he had not observed Garner using it. (Tr. at 91-96.)

The State then called John Sowell, a detective with the Great Falls Police Department. He responded to the call from EZ Money, found the stolen pickup, and apprehended Newhouse, after pursuing him on foot. In the pickup, Sowell found a billfold with identification for a "Russell Gardiner," a Montana State Prison identification card for a "Russell Glen Garner," and a pension plan check stub for a check issued to George Frost. In the meantime, Garner had been apprehended by another officer, and Sowell read Garner the Miranda warnings. Garner told Sowell that he had taken the pickup from Missoula and that several days later had picked up a friend in Bozeman. LaFountain cross-examined Sowell, establishing that Newhouse was the only person he had actually seen driving the pickup, that he was unable to obtain fingerprints from it, and that his memory about Garner's statements had been refreshed by looking at his report which he had dictated on June 5. (Tr. I at 96-129.)

After the prosecutor's redirect examination, LaFountain, at a side-bar conference, told the court that Garner wished to question Sowell himself. (Tr. I at 129-30.) The court asked LaFountain whether Garner wished to represent himself and LaFountain responded that Garner did not. LaFountain said that he was in conflict with Garner because LaFountain questioned the wisdom of Garner's requests. (Tr. II at 134-37.) The court took the position that counsel, unless he was dismissed by the client, had the authority to decide whether a question Garner posed was appropriate. LaFountain also said that Garner had made other requests of him that he had refused. Garner had refused to cooperate with him until two days before. (Tr. II at 137-40.)

Garner, after a statement from the court, elected to proceed pro se. He said:

> My grounds for that is I to this day have still never seen that video. I have asked him since August 25th of this year to watch that video and I have never been sat down and look at it.
>
> There was things brought in evidence yesterday that I have not seen. I have no copies. He doesn't even have copies of it in his own records. I've asked to file for my fast and speedy back in August. He's refused it for three months.

(Tr. II at 143-44.)

The court went on to discuss whether Garner wished to proceed pro se.

> COURT: I don't want to hear your complaints about Mr. LaFountain. All I want to know is whether or not you want Mr. LaFountain to continue as your counsel or you want to continue pro se. If you want to continue pro se, that's what we'll do.

DEFENDANT: Now that that's on the record, he can have it.

COURT: He can have what?

DEFENDANT: He can have the case. He can do whatever he wants. I wanted that on record.

COURT: So, I want clearly understood here that you want Mr. LaFountain to proceed with this case as your attorney; is that correct.

DEFENDANT: No, I do not.

COURT: Do you want to continue pro se?

DEFENDANT: Yes, I do.

COURT: All right. Mr. LaFountain, you can stand back as standby counsel. If Mr. Garner has any questions, he can ask you those questions as standby counsel.

(Tr. II at 144.)

After a brief discussion, the following conversation ensued:

LaFOUNTAIN: . . . . Second point is, I would like to put Mr. Garner on the stand to question him about his medication situation. I've had difficulty dealing with him in the past, and part of it has had to do with some, I feel with some type of a problem he's been medicated for, or maybe this isn't the appropriate time.

But basically, he was brought down here from Montana State Prison without his medications. I was told by the jail at one point that he went into a sweat. And --

COURT: Have you arranged --

LaFOUNTAIN: When he first came down he was more cooperative than he'd ever been. He was under the influence of his medication.

DEFENDANT: You are an idiot.

COURT: Mr. Garner, you're out of order.

DEFENDANT: I've had enough. Go ahead and send me back to jail. He has no rapport with these people over here. These people up here sit and laugh at him. This guy has asked if I would like more paper to write things down. This is a joke.

COURT: Mr. Garner, sit down. You're going to be in order or you're going to be shackled. Now, I don't want any more outbursts. Mr. LaFountain, what kind of medication are you talking about here?

DEFENDANT: I'm on antidepressants. This has nothing to do about being depressed. It has to do with being very angry about that man's incompetence if nothing less.

COURT: Ms. Macek. Any comment?

MS. MACEK: No, Your Honor. Mr. Garner's indicated what medication he's on. The fact that he feels that he's prepared to proceed and I would suggest we get the show on the road.

(Tr. II at 146-48.)

After Garner objected to the court's refusal to recall the witnesses who had been excused, the trial proceeded with Sowell resuming the stand. Garner

essentially established that he and Sowell had not been alone when Sowell questioned him immediately after his arrest. (Tr. II at 150-51.)

The State's next witness was Don Gerhart, an officer with the Great Falls Police Department. Gerhart had responded to the call from EZ Money and, after meeting briefly with Sowell, began a search in the vicinity. Gerhart said that a female told him someone was lying in her yard, and Garner's hearsay objection to that answer was sustained by the court. (Tr. II at 152-54.) Gerhart did locate someone lying curled up in a ball under a pine tree. He had the person come from under the tree and, Gerhart, because he matched the description given by the EZ Money employees, handcuffed him. Gerhart said that the only remark made by the person was that he was not the one Gerhart was looking for. (Tr. II at 154-55.) Gerhart later identified Garner from the photograph taken by Burns. Garner established that Gerhart had taken him into custody and had not read him the Miranda warnings. He also contested Gerhart's memory of how he found him lying under the tree. (Tr. II at 155-58.) On re-cross, Garner established that Gerhart had not written a report and could not be contradicted by an earlier statement if it differed from his testimony at court. (Tr. II at 160-61.)

The State's last witness was Dean Bennett, an officer with the Great Falls Police Department. Bennett had assisted Sowell in taking Newhouse into custody.

He heard Newhouse tell Sowell that Garner had picked him up in Bozeman. (Tr. II at 163-66.) Garner, on cross-examination, challenged (unsuccessfully) Newhouse's statement as repeated by Garner on hearsay grounds. (Tr. II at 168.) Garner also established that Gerhart did not see him in the truck, did not see him steal the truck in Missoula, and did not see him sign a check. (Tr. II at 170.)

The State rested, and Garner moved to dismiss the case because there was no evidence to show that he had signed a check or stolen a vehicle. The court denied the motion, and trial proceeded after a half-hour break. (Tr. II at 170-71.) Before Garner commenced his case-in-chief, the court had the following discussion with him.

COURT:	Mr. Garner, how are you coming?
DEFENDANT:	Good.
COURT:	All right. I want to make sure that before we proceed any further, that you understand exactly what it is you're doing here. You know, of course, that the sixth amendment guarantees you the right to counsel?
DEFENDANT:	Yes.
COURT:	And you've had counsel appointed for you?
DEFENDANT:	Yes.

COURT: Okay. Now, I want to make sure that you're aware of the nature of the charges against you. You understand that you're charged with theft and you're charged with forgery.

DEFENDANT: Yes.

COURT: Do you know what the penalties are for those offenses?

DEFENDANT: Twenty years for forgery, up to 2 years and up to 10 years, and also Mrs. Macek is seeking a persistent felony offender on me, so anywhere from 5 to 100 tacked on the end of that.

COURT: Okay, I mean --

MS. MACEK: Just as a correction to that, Your Honor, because Mr. Garner has already been declared as a persistent felony offender once, he actually, if convicted, is facing an additional minimum of 19 years to 100 years and that that sentence must run consecutively to his sentence on the underlying charges.

COURT: Okay. The penalty then for theft is, I think you said 10 years.

DEFENDANT: Yes.

COURT: In the Montana State Prison to on, up to 10 years and a fine of $50,000 or both. And for forgery, the penalty is imprisonment in the state prison for a term of not more than 20 years or a fine of not more than $50,000 or both. And then the persistent felony, or persistent offender issue is tacked on to that as a consecutive.

DEFENDANT: Excuse me, Your Honor, I'd like to know what amendment guarantees me the right to a fast and speedy trial.

COURT: I'm not sure which one it is. But it's one of the first 10 amendments.

DEFENDANT: Yes.

COURT: And you're aware of that. And you indicated that you intend to raise that as an issue. And you're certainly entitled to do that as grounds for appeal if you should be convicted.

As you know, the order that I issued required that pretrial provisions be required four weeks before trial and your attorney discussed --

DEFENDANT: And I asked him to.

COURT: I understand you asked him to and he said that he did not believe that the motion was well taken. He so chose in his capacity as counsel not to file that motion, which is his obligation to make the determination.

So, and I understand that's a concern that you have and that's apparently one of the reasons that you have elected to proceed --

DEFENDANT: I'd like to ask for a mistrial on the grounds that I have been misrepresented about by my attorney.

COURT: That's not the basis for a mistrial and I am not going to grant --

DEFENDANT: Ineffective counsel?

COURT: That's a matter for appeal. And I don't think that you've established -- nor am I going to listen to that MOTION at this time.

DEFENDANT: Okay.

COURT: The other thing I want to make sure of is that you understand the pitfalls of trying to represent yourself.

DEFENDANT: Yes, Your Honor. What I am trying to get across is that my lawyer was so, how would I put this? Did such a poor job that I, I have no way to continue this. I'm not prepared for this.

COURT: And so what you're telling me is that you don't feel competent to go forward individually?

DEFENDANT: Oh, I feel competent. But with the information here, with the statements, now I need more time. I'm going to have to have time to be able to go through this, to get to a legal library. I'm being held in Montana State Prison. I have it there. I would like to postpone for at least six months or have a chance to prepare for this on my own.

COURT: All right. Mr. Garner --

DEFENDANT: Your Honor, I can prove that my lawyer has been ineffective right here and right now. I have a list of things that she's sitting over here yesterday laughing and shaking her head. She knows that he ain't doing what he's supposed to be doing.

COURT: All right.

DEFENDANT: There's a whole list things that I can prove this man isn't in my best interest.

COURT: Let me briefly hear your list.

DEFENDANT: First off, until yesterday, that was the first time I seen that video, even though I started asking to see that video back in August before my omnibus hearing.

> There's evidence up there that I have never seen since my arrest. It's pulled out. I don't have copies of it. He doesn't have copies of it. I don't even know if he went through it.
>
> He didn't keep in touch. In the last four month's I've talked to my lawyer twice on the phone, one hour before we came to trial.
>
> He refuses to file a motion, refuses to ask questions that I asked him to ask.
>
> He has a very poor rapport with the jury. Yesterday he badgered that woman that knew you. And another juror stood up and threatened, had to stick up for her, if you're going to kick her off, kick me off, too.
>
> Never looked for a witness in Bozeman. Not at all. Never went up there. Never took any pictures of place up here so these people can understand that the people in that place cannot see behind the building.
>
> He has outright told me that I didn't have the right to a fast and speedy trial. And I'd like to know when that became effected. I asked back in August to file that motion, to make sure that my omnibus hearing that was filed.
>
> And that's--give me an hour I could think up some more things. It's just--

(Tr. II at 173-79.)

The court and Garner further discussed whether LaFountain had been ineffective. Garner wanted more time to prepare, and the court was unwilling to continue the case. (Tr. II at 179-81.) Garner then said:

DEFENDANT: I want to do this myself, but I need time to prepare for this case. And if an hour is all you're going to give me, then that's fine. But I need time to prepare for this. I don't have sufficient time.

But I want to represent myself because I feel that HE'S not doing his job and has not for quite some time. And the only reason he wasn't fired back months ago is the fact that I wanted my right to a fast and speedy. Firing him would have gave that up.

COURT: All right. I'll give you--we'll continue the recess until 1 o'clock. And I'll give you until then to prepare. Mr. LaFountain can work with you. You can use him for whatever resource you want to. We'll reconvene at 1 o'clock and proceed forward.

DEFENDANT: Thank you.

(Tr. II at 181-82.)

Garner called Officer Bennett as his first witness. Garner challenged Bennett's earlier statement that Newhouse had told him Garner had picked Newhouse up in Bozeman. Garner noted that Bennett's report simply said that Newhouse met Garner in Bozeman, but it was silent about whether Newhouse picked Garner up. (Tr. II at 183.) Bennett conceded that, saying that Newhouse had mentioned that to him before being given the Miranda warnings, that he "had mentioned that prior to me technically questioning him, so." (Tr. II at 184.)

Garner next called Officer Gerhart, challenging his statement that Garner had been "under a tree, balled up[.]" He read a report by another officer who was

with Garner which said Garner had been lying on the ground near some bushes. Garner contested the implication that he was hiding, and he also established that Gerhart had not heard Sowell ask him any questions. (Tr. II at 184-92.)

Garner recalled Detective Sowell. He confronted Sowell with Gerhart's testimony in which he stated he did not hear Garner make any statement to Sowell. He also pointed out that since Newhouse was unavailable, the State was making use of that to introduce remarks that Newhouse had purportedly made, and it was Gerhart's word against his that the Miranda rights were read and that Garner had made a statement. (Tr. II at 195-200.)

Garner called himself as his final witness. The State objected to his giving a narrative statement from the stand, and Garner agreed to have LaFountain ask him questions on direct examination. Garner's testimony was that he had been living in Bozeman with his wife, that she had broken both her legs and an arm in an accident, and that he had taken her to the airport near Belgrade for a flight to Seattle for surgery. He had been living away from home for a few nights because of disputes between himself and his wife. On the night of May 28, Garner met Newhouse at a trailer park, where Garner had his sleeping bag and other possessions. Newhouse said that he was from Idaho, and the two had a

conversation about getting around in Montana. They went out drinking and Garner slept that night underneath the truck. (Tr. II at 204-08.)

The next morning they decided to go to Great Falls together, although Garner's plan had been to take the bus. Garner had spent the money for the bus ticket "[i]n the bar getting drunk." (Tr. II at 209.) He had planned to stay with a friend in Great Falls. They drove first to Helena, where Garner ate at a McDonald's while Newhouse visited someone. Garner assumed that the purpose of the visit was to secure drugs; he also assumed that Newhouse was "dumping" him. He had learned that Newhouse had been in San Quentin for about eighteen years. Newhouse's plans were to go to Alaska to find some homesteader's cabin and get away from people. (Tr. II at 209-15.)

Newhouse returned, however, and they drove to Great Falls. During the drive, Newhouse pulled out a "bunch" of checks--federal checks and pension plan checks--which the two planned to cash. They arrived in Great Falls at about 4 or 5 p.m., and Garner was "getting pretty drunk by then." (Tr. II at 216-17.) Their plan was to cash a check at EZ Money (where Garner believed he would not be required to show identification), Newhouse would give him $50, and he would then go to his friend's house. Garner said that he had taken the check into the building with a signature on it, although he did not know who had signed it.

He was presented with a card to fill out, and he had problems doing so because he didn't have the check and he didn't know the signatory's address or social security number. He identified the check introduced into evidence, but denied that he had signed it. (Tr. II at 217-21.)

Garner said that he had left because he had to go to the bathroom and he had decided not to go through with cashing the check. He knew that cashing a check for more than $500 was a felony. He attempted to get Newhouse's attention and, when he did, Newhouse left in the pickup. He saw someone go after Newhouse, who he believed was a detective. He said he did not believe that the employees were suspicious. He simply decided to abandon the enterprise because it was wrong. He believed that he had not committed a criminal act because he did not receive any money. (Tr. II at 221-34.)

After Garner left the EZ Money building, he went into Pizza Hut and went to the bathroom. He then left Pizza Hut and walked up the street, into an alley, and into the yard where he was found by the police. He was afraid he would be taken to jail, but he did not believe that he had done anything wrong. He denied telling Sowell that he had picked up Newhouse, and insisted that he had said the opposite. (Tr. II at 234-40.)

After cross- and redirect examination (Tr. II at 240-58), Garner rested. (Tr. II at 258.) The court then discussed the instructions with counsel and Garner. (Tr. II at 240-68; see 11/30/95 Mins.) It agreed to give a lesser included instruction on unauthorized use of a motor vehicle. (Tr. II at 268.) The State argued that an instruction on attempt and voluntary abandonment proposed by LaFountain should not be given. (Tr. II at 268-73.) Garner and the prosecutor discussed the instruction; Garner argued that he had received no money and had changed his mind before the transaction was complete. After consulting the statute, the court concurred with the State and ruled that the delivery of the document constituted the offense, with the amount on the document determining whether the offense was a felony or misdemeanor. (Tr. II at 274.) Garner argued that he did not sign the document, but the court noted that Stevenson had testified otherwise, leaving a factual dispute for the jury to resolve. (Tr. II at 275.) When the court stated that the statute did not require actual receipt of funds, Garner said, "Well, then I have no other choice but to sit here and say that I am guilty of the forgery and throw me on the mercy of the court." (Tr. II at 276.) LaFountain then argued that the instruction should be accepted. (Tr. II at 276-83.) Garner interrupted:

DEFENDANT: Can I say something?

COURT: Sure.

DEFENDANT: I don't understand what the big deal about all of this is. I mean, nobody's following the law. It doesn't really matter.

COURT: I beg your pardon?

DEFENDANT: That's what I am saying. I mean, it's like they have these laws and you people follow them. And we have these laws, but we don't have to follow them. It makes no sense to me.

COURT: Well, I'm trying the very best I can to follow the law.

DEFENDANT: No, you're not. Because you know I have a right to fast and speedy and nothing has been done about that.

LaFOUNTAIN: I had began to raise the issue before about competence, about Mr.--I don't know.

COURT: Well, okay. My ruling is going to be that I am not going to give the defendant's proposed instruction number 15.

DEFENDANT: Well, right now I'd like to plead guilty to both charges and leave guys up to do with whatever you want to do. I'd like to be taken back.

COURT: Well, I'm not going to let you plead guilty under both charges until you have had an opportunity to discuss that with Mr. LaFountain.

DEFENDANT: Well, he doesn't listen to me. I'm crazy. He doesn't do his job. I'm crazy.

(Tr. II at 283-84.)

After further discussion with the State about instructions, the court asked Garner whether he had had an opportunity to consider the matter further. Garner replied, "Yes."

COURT:	What's your desire.
DEFENDANT:	I'd like to plead guilty to both counts.
COURT:	Would you come forward and take the stand. I want to ask you some questions, please.

(Tr. II at 286.)

There followed an extensive colloquy between the court and Garner--including some questioning by the State and a remark by LaFountain, that will be omitted here, but was reproduced in the trial court's order denying Garner's motion to withdraw his pleas. (Tr. II at 286-99; D.C. Doc. 111 at 7-13, Order, Respt's App. D.) At the close of questioning, the court found that Garner voluntarily entered guilty pleas to both counts. (Tr. II at 299.)

SUMMARY OF THE ARGUMENT

Garner was obviously competent to proceed, and the record of his discussions with the district court demonstrates that. He had not received his anti-depressant for three days, but denied that he was depressed; the record supports that statement. His disagreement with his counsel was understandable

and reasonable, and he had a clear understanding of the difficulties of representing himself. His actual conduct of his own defense was not irrational. When the district court ruled against his argument on a defense to the forgery charge, Garner understood that the evidence against him was overwhelming, and he pled guilty, voluntarily and intelligently. His behavior and his understanding of the proceedings were within the standard of competence; he was not delusional, and his behavior, although occasionally obstreperous, was not so disruptive as to prejudice him. There was not sufficient evidence of incompetence to require the court to hold a hearing.

The motion was filed almost four years after the entry of his guilty pleas. Garner does not justify its lateness. If the Court deems this acceptable, it would permit an unwarranted avoidance of the requirement that relief based entirely on the record be sought in a timely fashion. The motion was not a critical stage of these proceedings because it followed Garner's earlier, unsuccessful attempt at postconviction relief at which he had appointed counsel for both the initial and appellate stages.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED GARNER'S MOTION TO WITHDRAW HIS GUILTY PLEAS.

A. Standard of Review

1. Denial of Motion to Withdraw Guilty Pleas

Pursuant to Mont. Code Ann. § 46-16-105(2), a court may, for good cause shown, permit a defendant to withdraw a plea of guilty. See State v. Keys, 1999 MT 10, ¶ 11, 293 Mont. 81, 973 P.2d 812. This Court reviews a district court's denial of a motion for the withdrawal of a guilty plea for an abuse of discretion. See Keys, ¶ 11 (citing State v. Bowley, 282 Mont. 298, 304, 938 P.2d 592, 595 (1997).

> No set rule or standard exists under which a trial court addresses a request to withdraw a guilty plea; each case must be considered in light of its unique record. Our standard in reviewing a denial of a motion to withdraw a guilty plea is whether the district court abused its discretion

State v. Johnson, 274 Mont. 124, 127, 907 P.2d 150, 152 (1995) (citations omitted). Accord State v. Melone, 2000 MT 118, ¶ 15, 57 State Rptr. 493, 2 P.3d 233; Keys, ¶ 11; Bowley, 282 Mont. at 304, 938 P.2d at 595.

> This Court considers three factors to determine whether good cause existed and whether the District Court erred in refusing to allow withdrawal of a guilty plea: (1) the adequacy of the court's interrogation at the time the plea was entered regarding the defendant's understanding of the consequences of the plea;

(2) the promptness with which the defendant attempts to withdraw the plea; and (3) the fact that the plea was the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge.

As to the first factor, adequacy of the court's interrogation at the time the plea was entered, this Court has previously stated:

> Where a District Court has done all that it can to determine from the defendant or otherwise, that the proposed plea of guilty is voluntarily made, the defendant understands what he is doing and is advised of the consequences of his plea, including the nature and extent of his punishment, has been adequately advised by counsel, and has been treated fairly at all stages of the prosecution against him, and that in fact the defendant states he is guilty of the charges made, then this Court has a duty to support the District Court when it allows a plea of guilty to be entered in place of a plea of not guilty.

Johnson, 274 Mont. at 127-28, 902 P.2d at 152 (citations omitted).

> The test for determining the validity of a guilty plea is whether the plea represents a "voluntary, knowing, and intelligent choice among the alternative courses of action open to the defendant." This Court will deem a guilty plea involuntary when it appears that the defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the possibility exists he may have pled guilty to a crime of which he is innocent. If there is any doubt that a guilty plea was not voluntarily or intelligently made, the doubt must be resolved in favor of the defendant.

Keys, ¶ 12 (citations omitted).

2. Competence

The standard for determining whether a criminal defendant is fit to proceed to trial is set forth at § 46-14-103, MCA:

> A person who, as a result of mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.
>
> The trial court must determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." This Court's standard for reviewing a finding of competence to proceed to trial is whether substantial evidence supports the district court's decision that the defendant was fit to proceed to trial.
>
> . . . .
>
> "[D]ue process requires that a hearing be held whenever evidence raises a sufficient doubt about the mental competency of an accused to stand trial." The hearing operates as a safeguard to ensure that an accused is not convicted while incompetent. A court's failure to hold a competency hearing when sufficient doubt as to the accused's competency is raised violates the accused's due process rights. The doubt raised as to an accused's competency need not come from the defendant or the defendant's attorney. A court has the duty to order a competency hearing *sua sponte* if the court has reasonable grounds for concluding that there is a good faith doubt as to a defendant's competency.

State v. Bartlett, 282 Mont. 114, 119-20, 935 P.2d 1114, 1117 (1997) (citations omitted).

Garner argues that the Court should adopt a higher standard, that of a de novo review, following United States v. Vest, 125 F.3d 676, 678 (8th Cir. 1997), cert. denied, 120 S. Ct. 548, 145 L. Ed. 2d 426 (1999), because the

voluntariness of Garner's plea is at issue. (Appellant's Br. at 18.) There appears to be no reason to vary from the standard established by this Court. Vest's plea followed an agreement with the government. He pled guilty in January of 1996 and, in August of the same year, before sentencing, moved to withdraw his guilty plea, contending that the plea agreement was coercive. If Vest applies, Garner's motion was properly denied because he does not assert innocence, the motion was filed just two weeks short of four years after the entry of his guilty pleas, and Garner has offered no showing that the prosecution would not be prejudiced by the passage of so much time. The test applied in Vest was:

> (1) whether defendant established a fair and just reason to withdraw his plea; (2) whether defendant asserts his legal innocence of the charge; (3) the length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the government will be prejudiced.

Vest, 125 F.3d at 679.

B. The District Court Correctly Found Insufficient Grounds for Further Inquiry on Competence at Trial.

1. There was Not Sufficient Evidence at Trial to Require a Competency Hearing.

Garner argues that the record shows he was not competent at the time he entered his guilty pleas because he was not taking his prescribed anti-depressant and because his behavior during the trial showed his incompetence. He claims

that the court should have inquired further because LaFountain reported that Garner was uncooperative from lack of medication. Garner attributes his uncooperative behavior to his underlying mental problems, and he points to his abrupt decision to enter a plea during the settlement of instructions as further evidence of his lack of competence. (Appellant's Br. at 20-27.)

Garner relies on Minnesota v. Bauer, 310 Minn. 103, 245 N.W.2d 848 (1976), distinguishing it from Bartlett. Bauer does not, however, stand for the argument that Garner's uncooperativeness alone should have triggered a further inquiry as to his competence. (Appellant's Br. at 22.) The Bauer court referred not only to Bauer's uncooperativeness, but also to many other facts about Bauer's mental condition known to the trial court. A psychiatrist at a mental hospital had alerted the United States Secret Service that Bauer was dangerous, and Bauer killed one of several officers sent to apprehend him under an order stemming from a petition for commitment. The court had before it not only an expert opinion that Bauer had paranoid delusions and a report that his appointed counsel could not form a defense because of Bauer's unrealistic ideas about the criminal justice system, but also that Bauer would not cooperate with further mental examinations. The opinion's specific holding was that the trial court erroneously gave too little weight to several facts:

> In our view, the significant evidence before the trial court relevant to the defendant's mental condition was (1) the public defender's judgment as friend of the court that the defendant was incapable of participating in or making a legal defense, (2) Dr. Malmquist's cautionary opinion of April 20, 1972 that the defendant might regress and be unable to function adequately, and (3) Dr. Swartz's medical opinion that the defendant was paranoidally psychotic, rendering him incapable of standing trial. We believe that the trial court gave that evidence of incompetency too little weight. Had it been given proper consideration, we are convinced that the constitutionally required procedure would have been to suspend the trial and conduct further inquiry.

Bauer, 310 Minn. at 121-22, 245 N.W.2d at 858.

The Minnesota court was unwilling to treat Bauer's uncooperativeness in further mental examinations as a waiver. "The defendant's refusal to cooperate in further psychiatric evaluation certainly presents the most troublesome problem. However, we cannot agree that such refusal, if the result of mental disorder, can deny him his constitutional rights of due process and fair trial." Bauer, 310 Minn. at 120-21, 245 N.W.2d at 858. The State does not disagree with this holding, since there is indeed a logical inconsistency in fixing weight on a defendant's waiver of competency issues when other, significant evidence shows the defendant's competence is questionable. Bauer, however, did not hold that uncooperativeness itself is a characteristic reserved only to paranoid psychosis.

If trial judges and public defenders share one burden, it is dealing with uncooperative, belligerent defendants who have strong opinions about legal issues,

usually based on an overly literal interpretation of a statute or case. Garner did not show himself to be unreasonably uncooperative, however. He was abrupt and unpolished in his speech to the district court, to be sure, but his complaints were specific and understandable. He was angry that LaFountain had not been in contact with him, that he had not seen the video, and that he had not seen copies of the exhibits against him. He did not believe that LaFountain was an effective or respected attorney, and he was frustrated that LaFountain had not filed a motion on speedy trial issues. (Tr. II at 143-48.) The trial court and LaFountain would have been aware that such a motion would have had little merit when Garner's trial began less than 180 days after Garner's arrest, during which time Garner was imprisoned on another charge. For a lay person, however, waiting six months to resolve a charge would not seem "speedy."

Garner was also convinced that he was innocent of forgery because he did not receive any money for the check, and he argued that there was no direct evidence that he had actually signed the check. (Tr. II at 221-34, 274-76.) LaFountain had offered an instruction consistent with this argument, which, after considerable argument, the court refused. The court also told Garner that the evidence of whether he had actually signed the check was a jury question, since Stevenson had testified that he did sign it in her presence. (Tr. I at 28.)

Under those circumstances, it was reasonable for Garner to have entered a plea of guilty. His own testimony contained sufficient evidence to satisfy the elements of the crime of forgery as contained in the State's Proposed Instruction No. 19 (D.C. Doc. 20), which the court had agreed to give. (Tr. II at 262.) Even without that evidence, the video, the testimony of the EZ Money employees, and the testimony of George Frost (the owner of the check at issue) were obviously enough to convict him. Garner's legal positions were sometimes incorrect, but never delusional or fanciful. In light of the judge's ruling, pleading guilty was not an unreasonable decision.

Garner questioned several witnesses and testified himself (with LaFountain questioning him). He was primarily focused on showing that the police did not write their reports contemporaneously with his arrest and that a statement he purportedly made to one officer could not be confirmed. He attempted to show that he was not hiding from the officers. Given the strength of the evidence against him on the forgery, the value of his various direct examinations could be questioned, but their content does not show he was delusional. His testimony refuting the theft charge was coherent, and the court approved a lesser included offense on unauthorized use of a motor vehicle. (Tr. II at 268.) The court actually sustained one of Garner's hearsay objections. (Tr. II at 152-54.) Another hearsay

objection that implicated Garner, attributed to a remark an officer made to Newhouse, was wholly reasonable under Lilly v. Virginia, 527 U.S. 116 (1999). (Tr. II at 168.) Garner's theories about his own defense, although mistaken, were not so outrageous as to show incompetence and stand in stark contrast to the frankly delusional ideas held by the defendant in Bauer. See Bauer, 310 Minn. at 109, 245 N.W.2d at 852 n.4.

Garner argues that LaFountain's concern about Garner not receiving his anti-depressant should have resulted in a competency hearing. (Appellant's Br. at 21.) The issue is not one of waiver, but whether there was evidence raising a sufficient doubt about Garner's competence. Bartlett, 282 Mont. at 120, 935 P.2d at 117. The district court, either at the original trial or on deciding the motion to withdraw the guilty plea, had no evidence before it to suggest that Garner's functioning was impaired because he had not received his anti-depressant for three days. Garner offers no authority that the use of anti-depressants alone demonstrates incompetence. There were no "strong warnings in the court file" about his need for medication, as in Miles v. Stainer, 108 F.3d 1109, 1113 (9th Cir. 1997). Ordinary experience would tell the court that anti-depressants, unlike other psychotropics, are prescribed for mental problems that would not render someone incompetent. LaFountain was concerned not with Garner's ability to understand the proceedings, but with Garner's failure to cooperate with him.

(Tr. II at 146-48.) (Defense counsel's concerns about competence, standing alone, do not require a competency hearing. State v. Bostwick, 1999 MT 237, ¶ 18, 296 Mont. 149, 988 P.2d 765.) Garner himself was clearly not depressed; if anything, he was angry and aroused, but not irrationally so. He was focused on specific complaints about LaFountain, and had reasonable challenges to the evidence against him.

LaFountain's last remarks about Garner's competence came during settlement instructions when Garner became angry about the court and LaFountain discounted his speedy trial issue. (Tr. II at 284.) But there was nothing in the record to suggest that Garner could not understand the matters at issue and, albeit with some rancor, cooperate with LaFountain so that he could question Garner on direct examination. The two were of one mind on the issue of abandonment as a defense to forgery (Tr. II at 283), and LaFountain argued extensively on this issue during the settlement of instructions. Garner understood the import of the court's ruling on that issue, and pled guilty accordingly.

Garner was belligerent and unwise, but was not incompetent. The extensive discussions on the record that involve Garner show that, in spite of the mention of anti-depressants, there was no evidence that Garner did not have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings

against him." Godinez v. Moran, 509 U.S. 389, 396 (1993) (citations omitted); Drope v. Missouri, 420 U.S. 162, 171 (1975); Dusky v. United States, 362 U.S. 402 (1960).

2. The District Court Correctly Decided that the Motion to Withdraw the Guilty Plea Did Not Require a Hearing.

a. There is no evidence warranting a retrospective competency hearing.

This Court has said that in certain circumstances a retrospective competency hearing may be held, although such hearings are disfavored. Bostwick, ¶ 30, citing Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994), cert. denied, 516 U.S. 976 (1995). Garner's situation was not similar to that in Bostwick, where there were numerous indicia of Bostwick's incompetence, including his trial counsel's express concern about whether Bostwick was "grounded enough in reality." Bostwick, ¶ 20. The Court detailed the evidence on competence that was known to the trial court and concluded it was in error when it declined to hold a competency hearing. Bostwick, ¶¶ 22-29. Bostwick did not hold that matters unknown to the trial court at the time it made its decision require a retrospective competency hearing. In determining whether there was substantial evidence of Garner's competency when he entered a plea of guilty, this Court should examine only the evidence before the district court at the time of the plea hearing.

Amaya-Ruiz v. Stewart, 121 F.3d 486, 489 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998), following United States v. Lewis, 991 F.2d 524, 527 (9th Cir. 1993).

In support of his argument that the Court consider later-acquired evidence, Garner cites Boag v. Raines, 769 F.2d 1341 (9th Cir. 1985), cert. denied, 474 U.S. 1085 (1986). Boag, although it noted that new evidence on incompetence could be examined on habeas corpus, held that the new evidence Boag presented was insufficient to show incompetence at the time of trial.

> [E]vidence of two emotional and inappropriate outbursts at trial, coupled with the bizarre and gruesome nature of the crime charged, and psychiatric testimony characterizing the defendant as "severely disturbed" and suffering from paranoid schizophrenia, was insufficient to raise a bona fide doubt with respect to the defendant's competency to stand trial. In cases finding sufficient evidence of incompetency, the petitioners have been able to show either extremely erratic and irrational behavior during the course of the trial, *e.g.*, *Tillery v. Eyman*, 492 F.2d 1056, 1057-58 (9th Cir. 1974) (defendant screamed throughout the nights, laughed at the jury, made gestures at the bailiff, disrobed in the courtroom and butted his head through a glass window), or lengthy histories of acute psychosis and psychiatric treatment, *e.g.*, *Moore v. United States*, 464 F.2d 663, 665 (9th Cir. 1972) (defendant repeatedly hospitalized for acute mental illness and hallucinations).
>
> We discount the probative value of Boag's suicide attempts because they occurred long before the trial. Boag's head injuries and his alcoholism also properly were discounted by the district court because Boag failed to show that they caused any mental impairment at the time of the trial.
>
> Similarly, the report of the prison psychiatrist that declared Boag to have a sociopathic personality is of little relevance. "[A] sociopath suffers from no disability which could affect competency.

> The medical term solely describes manipulative, egocentric persons who frequently commit antisocial acts without feelings of remorse." The statement of a California judge, six months before trial, that Boag needed "intensive psychiatric treatment," was a recommendation to the Department of Corrections, made in a sentencing context, and therefore was not sufficient to create doubt as to Boag's competence.
>
> We conclude that the district court properly found that the new evidence presented by Boag did not raise a real and substantial doubt as to his competency.

Boag, 769 F.2d at 1343-44 (citations omitted).

Garner's affidavit and memorandum accompanying the motion referred to a psychological history made known to the district court through the presentence investigation. He was admitted to the Montana State Hospital in 1988, having threatened suicide while jailed. He was treated there for approximately one year and eight months under a diagnosis of "alcohol abuse, psychoactive substance abuse, antisocial personality disorder, depression, dysthymia secondary to post-traumatic stress disorder." (D.C. Doc. 30 at 5.) Garner's hospitalization occurred some seven years before the trial. By the time of trial, he had been incarcerated or returned to prison for almost six months, and there was no evidence that he was affected by alcohol or other illegal drugs. He had been receiving anti-depressants regularly, except for the three days preceding trial, and he denied being depressed both at the trial and at his presentence investigation interview. (D.C. Doc. 30 at 5.)

As noted in Boag, his sociopathy, or antisocial personality disorder, would not affect his competence. Indeed, Mont. Code Ann. § 46-14-101 provides that "the term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or antisocial behavior."

b. The motion was untimely.

Although Mont. Code Ann. § 46-16-105(2) permits the filing of a motion to withdraw a guilty plea "[a]t any time before or after judgment," timeliness is a factor that the Court examines when determining good cause. Johnson, 274 Mont. at 127-28, 902 P.2d at 152. Garner had earlier filed a petition for postconviction relief and a motion for an out-of-time appeal. After a hearing in district court, this Court determined that Garner was advised of the time limits on appeal, and denied his petition on the issue of the persistent felony offender notice and on filing a late appeal. Garner was represented by counsel on the petition for postconviction relief and at the hearing to determine whether his counsel had advised him of the time limits for appeal. He offers no explanation for failing to move earlier to withdraw his plea of guilty. (Appellant's Br. at 30.) The motion and its accompanying documents recite nothing not of record at the time of sentencing (except for the name of his anti-depressant, nortriptyline), and the district court was justified in deeming the motion untimely. (D.C. Doc. 111 at 14, Order.)

See State v. Mahoney, 264 Mont. 89, 95, 870 P.2d 65, 69 (1994); State v. Bull Coming, 253 Mont. 71, 75, 831 P.2d 578, 579 (1992). Further, Garner does not assert that he was innocent.

> The fundamental purpose of allowing a defendant to withdraw a guilty plea is to prevent the possibility of convicting an innocent man. Accordingly, a plea of guilty will be deemed involuntary where it appears that the defendant was laboring under such a *strong inducement, fundamental mistake, or serious mental condition* that the possibility exists he may have pled guilty to a crime of which he is innocent.

State v. Miller, 248 Mont. 194, 197, 810 P.2d 308, 310 (1991) (citations omitted, emphasis in original). Accord State v. Turner, 2000 MT 270, ¶ 65, ___ State Rptr. ____, ___ P.3d ___.

C. The Court Properly Allowed Garner to Proceed Pro Se.

Garner argues that the district court allowed him to proceed pro se without the inquiry required under Faretta v. California, 422 U.S. 806, 835 (1975). See also State v. Langford, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994), cert. denied, 513 U.S. 1163 (1995). (Appellant's Br. at 25-26.)

Although the court did permit Garner to proceed pro se with LaFountain as standby counsel, without a Faretta inquiry, it remedied the error soon after Garner began. There was no prejudice to Garner. Sowell, one of the arresting officers, had been cross-examined by LaFountain, but had not been excused. The court

allowed Garner to recall him for brief questioning. (Tr. II at 150-51.) Garner then cross-examined the State's final two witnesses and moved to dismiss both charges. (Tr. II at 152-71.) After a recess, the court involved Garner in a discussion that fully satisfied Faretta and Langford. (Tr. II at 171-82.) The court did not have to rely on a series of monosyllabic replies that revealed little about Garner's true understanding of the risks of representing himself. This interchange, coupled with the earlier discussion that led to Garner's pro se questioning, accorded with this Court's observation that

> it is the district court judges who consider, assimilate, and absorb the nuances of each individual case. They are not constrained, as we are, to garnering all of their information from a cold record. . . . So long as substantial credible [evidence] exists to support the decision of the District Court . . . it will not be disturbed on appeal.

Langford, 267 Mont. at 100, 881 P.2d at 492 (citations omitted). The more critical part of his defense, when he took the stand, came after the court's inquiry (Appellant's Br. at 26), and it was clear even before the court questioned him that he was well aware of the difficulties of the task that he wished to assume.

D. The District Court Accepted Garner's Guilty Plea Properly.

Garner complains that his responses to the district court's questions on changing his plea did not allow the court to determine whether Garner understood the questions. (Appellant's Br. at 29.) The colloquy between Garner and the court

was lengthy and was repeated in full by the district court in its order denying the motion to withdraw the plea. (Tr. II at 285-99; D.C. Doc. 111 at 7-13, Respt's App. D.) The court's inquiry was exacting and fully satisfied the standards this Court has established. See, e.g., Melone, supra. Garner's responses were not entirely monosyllabic and perfunctory, and there was sufficient indication in that discussion to warrant the court's decision to accept his guilty plea. But the colloquy does not stand alone. The court and Garner engaged in several lengthy discussions throughout the trial and it cannot be said that Garner was reticent in making his thoughts known. The trial court had ample opportunity--indeed, more than would usually occur--to take Garner's measure for his competence and his understanding, and there is more than substantial evidence to justify the conclusion that Garner entered his guilty plea voluntarily and intelligently.

II. GARNER'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS NOT A CRITICAL STAGE OF THE PROCEEDINGS.

Although there is authority that a motion to withdraw a guilty plea constitutes a critical stage of proceedings at which there is a right to counsel, that authority should not apply to a motion filed under the circumstances of this case.

> This Court has not established any bright line in the sequence of the proceedings against a criminal defendant to which the right to counsel guaranteed by Article II, Section 24 of the Montana Constitution

> attaches. Instead, this Court has focused on the potential implication or result that any proceeding has against the defendant. We have held that right to counsel attaches at any "critical stage," which is defined solely as "any step of the proceeding where there is potential for substantial prejudice to the defendant."

Ranta v. State, 1998 MT 95, ¶ 25, 288 Mont. 391, 958 P.2d 670 (citations omitted). The Court there held that proceedings at sentence review were a critical stage because of the potential for an increased sentence. Id.

Garner faces no such risk or potential prejudice in this proceeding, but there is a better ground for not holding that this motion constitutes a critical stage of these particular proceedings. The motion is untimely, occurring almost four years after the entry of plea and three years after the filing of a petition for postconviction relief. Garner has enjoyed the assistance of three attorneys, two of them on appellate matters and, since all his grounds are based on matters of record dating from his sentencing in January 1996, at the latest, this motion could have been brought in his original petition. Mont. Code Ann. § 46-21-105(1)(a) (1995).

The cases Garner cites as authority on this issue should not be followed because none of them involved an untimely motion filed after an attempt at postconviction relief. In Fortson v. Georgia, 272 Ga. 457, 458, 532 S.W.2d 102, 103 (2000), the motion was filed thirty days after sentencing. Of the thirteen cases listed in Garner's footnote to Fortson (Appellant's Br. at 32), seven discussed

motions to withdraw a guilty plea filed before sentencing, five at sentencing, and two after sentencing. Of those filed after sentencing, one was filed ten days later, and the other was filed within an undisclosed time after sentencing but no more than six months after arraignment. United States v. Cronic, 466 U.S. 648 (1984), cited to support the argument for automatic prejudice, did not apply to such motions at all. Absence of counsel under these circumstances did not prejudice Garner because his motion did not occur at a critical stage of these particular proceedings. See United States v. Crowley, 529 F.2d 1066, 1069 (3d Cir.), cert. denied, 425 U.S. 995 (1976).

CONCLUSION

The district court's order denying the motion to withdraw Garner's guilty plea should be affirmed.

Respectfully submitted this 8th day of November, 2000.

JOSEPH P. MAZUREK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____

JIM WHEELIS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Respondent to be mailed to:

Mr. William F. Hooks
Attorney at Law
211 Fifth Avenue
Helena, MT 59601

Mr. Brant S. Light
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

DATED: 11/8/00 _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 8.0 for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JIM WHEELIS

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 00-091

STATE OF MONTANA,

Plaintiff and Respondent,

v.

RUSSELL GARNER,

Defendant and Appellant.

APPENDIX

Russell G. Garner, A.O.# 23568.
Glendive Regional Prison.
440 Colorado Blvd.
Glendive, Mont. 59330.

EIGHTH JUDICIAL DISTRICT COURT OF MONTANA, CASCADE COUNTY

STATE OF MONTANA,	*	
PLAINTIFF,	*	CAUSE NO. CDC-95-247
	*	
V.	*	
	*	MOTION TO WITHDRAW PLEA OF
RUSSELL G. GARNER,	*	GUILTY AND INSERT A PLEA OF
DEFENDANT.	*	NOT GUILTY.

COMES NOW, the defendant, Russell G. Garner appearing *pro-se* to respectfully move this Honorable Court pursuant to 46-16-105 of the Montana Code Annotated to withdraw his plea of guilty and insert a plea of not guilty in the above entitled matter, for the following reasons:

1.) For at least three (3) days prior to the defendant making his plea of guilty plea and also at the time the defendant entered in to his plea of guilty he had been denied his prescribed psycho-tropic medication as the defendant has a long and extensive documented history of mental illness.

2.) At the time the defendant made his plea of guilty to the court he was not mentally competent or fit to make such a plea, therefore making the defendant's plea of guilty involuntary and done so by mistake.

3.) Approximately two-and a half (2.5) hours prior to the defendant making his guilty plea the defendant's attorney of record expressed a concern to the court regarding the defendant's mental

competency or fitness for it was at this time (as the record will show) defense counsels concern that the defendant was mentally unfit at this time. The court ignored for reasons of its own its duty bound obligation to order a hearing *sue-sponte* to inquire if there was a good faith doubt to the defendant's mental competency.

4.) If there is any doubt that a plea was involuntary, as the defendant's plea was then the doubt should be resolved in favor of the defendant. For at any time before or after judgement, the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

The defendant after showing good cause respectfully requests this Honorable Court to move in his favor and grant the defendants motion to withdraw his plea of guilty and insert a plea of not guilty.

Respectfully submitted on this 21st day of 22, 1999.

Russell G. Garner, A.O.#23568
Glendive Regional Prison.
440 Colorado Blvd.
Glendive, Montana, 59330.

NOTARY PUBLIC

STATE OF MONTANA)
) ss:
COUNTY OF DAWSON)

Sworn to before me on this 22 day of October, 1999.

(S E A L)

Notary Public

NOTARY PUBLIC for the State of Montana
Residing at Glendive, Montana
My Commission Expires January 6, 2002

CERTIFICATE OF SERVICE

I Russell G. Garner, the defendant in the above entitled matter do hereby certify that on the 22 day of OCT, 1999, I mailed a true and correct copy of the foregoing, *"MOTION TO WITHDRAW PLEA OF GUILTY AND INSERT A PLEA OF NOT GUILTY"* by the U.S. Mail, First Class Postage, addresses to the following:

Julie Macek, Deputy County Attorney.
Cascade County Attorneys Office.
121 4th Street North.
Great Falls, Montana, 59401.

Russell G. Garner.

Russell G. Garner, A.O.# 23568.
Glendive Regional Prison.
440 Colorado Blvd:
Glendive, Mont. 59330.

EIGHTH JUDICIAL DISTRICT COURT OF MONTANA, CASCADE COUNTY

STATE OF MONTANA,	*	
PLAINTIFF,	*	CAUSE NO. CDC-95-247
	*	
V.	*	AFFIDAVIT IN SUPPORT OF
	*	DEFENDANT"S MOTION TO
RUSSELL G. GARNER,	*	WITHDRAW PLEA OF GUILTY AND
DEFENDANT.	*	INSERT A PLEA OF NOT GUILTY.

RUSSELL G. GARNER, being duly sworn, deposes and says:

1.) I am the defendant in the above entitled case. I make this affidavit in support of my motion to withdraw plea of guilty and insert a plea of not guilty.

2.) The defendant respectfully requests this Honorable Court to move in his favor and grant his motion to withdraw his plea of guilty and insert a plea of not guilty, based on good cause shown for the following reasons:

3.) On or about May 30th, 1995. The defendant Russell G. Garner was originally charged in the above entitled matter.

4.) On or about July 1995 the defendant was transferred to a prisoner holding facility in Fort Benton, Montana for closer observation due to a earlier suicide attempt by the defendant while being incarcerated in the Cascade County Jail on charges related to the above entitled matter.

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5.) On or about September 29th, 1995 the defendant was transferred from the Fort Benton holding facility to the Montana State Prison in Deer Lodge, Montana to await trial in Cascade County, on the above entitled matter.

6.) On or about sometime in early October, 1995 after arriving to the Montana State Prison the defendant at the orders of medical personnel employed at the Montana State Prison, was placed on a prescribed and needed psycho tropic medication called "nortripyline" as the defendant has a previously established and documented history of mental illness as was diagnosed during a two (2) year court ordered commitment at the Montana State Mental Hospital in Warm Springs, Montana, from sometime in 1988 until sometime in 1990 and it was established at this time by doctors that the defendant does suffer from: "post dramatic stress disorder", "dithemia secondary only to chronic depression" in which he needs the above said prescribed medication to enable him to be mentally competent and that without this already established needed medication the defendant becomes irrational and mentally incompetent.

7.) On or about November 27th, 1995 the defendant at the order of the Eighth Judicial District Court was transferred from the Montana State Prison to the Cascade County Jail to appear in court in the above entitled matter, also at this time and at all other times after the defendant's November 27th transfer the defendant was denied by Cascade County Authorities or their agents his above said needed and prescribed medication for no apparent reason this denial of medication made the defendant irrational and mentally incompetent almost immediately and most certainly when the defendant was appearing in court on the above entitled matter on:

8.) Or about November 29th 1995 while still being denied his prescribed and needed medication as described already in this affidavit the defendant appeared in court in the above entitled matter. The defendant at this time in particular was suffering from [ALL] symptoms of his mental illness which

does include but is not limited to "irrational behavior and thinking", "incompetency", at this time and approximately two-and-a half (2.5) hours prior to the defendant making an irrational guilty plea the defendant's attorney raised an issue before the court pertaining to the defendant's mental incompetency or unfitness this issue at this time was not addressed by the court nor was this issue ever addressed by the court despite a duty bound obligation entrusted to the court to address any issues pertaining to a defendants mental competency or fitness through test and other relevant procedures prior to pursuing litigation against the defendant. Instead two-and-a half (2.5) hours later while the defendant was victim to his own mental illnesses the defendant mistakenly and involuntarily entered a plea of guilty and this plea was excepted by the court at this time in the above entitled matter.

9.) As set forth in the memorandum of law submitted with this motion, these facts, along legal merit of the defendant's claims show good cause and support the defendant's motion to withdraw plea of guilty and insert a plea of not guilty.

WHEREFORE, the defendant's motion "to withdraw his guilty plea and insert a plea of not guilty" should be granted.

Respectfully submitted on this 22 day of OCT, 1999.

Russell G. Garner

Russell G. Garner, A.O.#23568
Glendive Regional Prison.
440 Colorado Blvd.
Glendive, Montana, 59330.

NOTARY PUBLIC

STATE OF MONTANA)
) ss:
COUNTY OF DAWSON)

Sworn to before me on this 22 day of OCT, 1999.

(S E A L)

Timothy G. Reno

Notary Public
NOTARY PUBLIC for the State of Montana
Residing at Glendive, Montana
My Commission Expires January 6, 2002

CERTIFICATE OF SERVICE

I Russell G. Garner, the defendant in the above entitled matter do hereby certify that on the 22 day of OCT, 1999, I mailed a true and correct copy of the foregoing, *"AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND INSERT A PLEA OF NOT GUILTY"* by the U.S. Mail, First Class Postage, addresses to the following:

Julie Macek, Deputy County Attorney.
Cascade County Attorneys Office.
121 4th Street North.
Great Falls, Montana, 59401.

Russell G. Garner

Russell G. Garner.

Russell G. Garner, A.O.# 23568.
Glendive Regional Prison.
440 Colorado Blvd.
Glendive, Mont. 59330.

EIGHTH JUDICIAL DISTRICT COURT OF MONTANA, CASCADE COUNTY

STATE OF MONTANA,	*	
PLAINTIFF,	*	CAUSE NO. CDC-95-247
	*	
V.	*	MEMORANDUM OF LAW IN SUPPORT
	*	OF DEFENDANT'S MOTION TO WITH-
RUSSELL G. GARNER,	*	DRAW PLEA OF GUILTY AND INSERT
DEFENDANT.	*	A PLEA OF NOT GUILTY.

Statement of facts

Approximately four (4) years ago, around or about November of 1995, the defendant in the above entitled matter, Russell G. Garner, appearing in the Eighth Judicial District Court of Montana, County of Cascade, entered a plea of guilty in the above entitled matter. However as the defendant can only now show this honorable court through his own oral testimony, relevant medical documents along with other relevant institutional documentation and relevant court transcribed transcripts. That he the defendant involuntarily entered the plea of guilty in the above entitled matter, as the defendant on or about November 29th, 1995 and particularly at the time of entering such an irrational plea as guilty to the court was not mentally fit or competent to knowingly make such a plea due to the fact that the defendant was at this time suffering from real

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and severe psychological and mental disorders making the defendant a victim of himself and not voluntarily responsible for making the guilty plea. These mental disorders were at this time brought upon by the unwarranted denial of the defendant's prescribed psycho tropic medication "Nortriptyline" by the Cascade County Jail authorities or their agents for at least three (3) consecutive days prior and including the date the defendant entered the plea of guilty to the court. It had been prior to the defendant's November 29th, 1995, previously determined by prudent psychological and other medical personnel that the defendant needs this medication to be rational in his actions and thoughts and to also be mentally competent, as he suffers from a long history of documented mental illnesses such as "Post Dramatic Stress Disorder", "Disthemia, secondary only to Chronic Depression." as the defendant only seven (7) years prior to appearing in court for the above entitled matter was committed by a Montana District Court in Lewis and Clark County for two (2) years to the Montana State Mental Hospital in Warm Springs, Montana where the above said mental disorders of the defendant's were discovered, documented and the above said medication was originally prescribed for treating these life long disorders.

Also the defendant with the aid of relevant court transcribed transcripts which in pertinent parts will show to the court that in the proceedings in the above entitled matter the defendant was denied by the court a mandatory hearing in which the court was at the time duty bound to order as to inquire in to the defendants mental fitness or competency to proceed in the litigation that was at the time pending against him prior to the defendant ever being allowed by the court to enter a plea of guilty.

Hours prior to the defendant entering a plea of guilty to the court in the above entitled matter. The defendants attorney raised an issue to the court, in open court pertaining to the current mental fitness of the defendant due to the defendant's irrational behavior at the time this issue was

raised. The court for reasons of its own at this time chose not to address the issue raised by the defense attorney questioning the defendant's mental fitness or competency. Despite its reasoning for not addressing this issue raised. The court at this time was duty bound to halt in its current litigation against the defendant and order a hearing *sue sponte* to see if based on investigation and testing if there was a good faith doubt as to the defendant's mental fitness or competency. This mandatory hearing was never ordered nor was there any inquiry by the court at this time in regards to the defendant's mental fitness or competency to proceed.

Argument

46-16-105 of the Montana Code Annotated reads in a pertinent part, *"... at anytime before or after judgement, the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."*

Based on the plain language contained in M.C.A. 46-16-105, the defendant is now respectfully motioning this Honorable Court to permit him to withdraw his plea of guilty and substitute it with a plea of not guilty even though it has been four (4) years after the fact. However 46-16-105 clearly states that "at anytime before or after judgement".

The defendant does herein state for the courts convenience that his reasoning for only now bringing these facts contained in this motion to the courts attention is because he is not familiar with the workings of the law and because of his mental disabilities he is unable to fully comprehend or understand the fundamental workings of the courts and the criminal justice system.

46-14-221 of the Montana Code Annotated reads in a pertinent part, *"... the issue of the defendant's fitness to proceed may be raised by the .... or the defendant's counsel .... when the issue is raised it must be determined by the court"*. Only hours prior to the defendant erroneous

entry of a guilty plea the defendants counsel raised the issue to the court challenging the defendant's mental fitness or competency to proceed. However for reasons of its own and unknown to the defendant the court did not at this time, or at any other time address these issues raised by the defense counsel as the court was duty bound to address these issues immediately once raised by ordering a hearing *sue sponte* to inquire if there is a good faith doubt as to the defendants fitness or competency, ***see, St. V. Bartlett, 282 M 114, 935 P2d 1114, 54 St. Rep. 268 (1997).***

The defendant does have a long and documented history of mental illness, this fact and the fact that the defendants attorney did raise the issue to the court, in open court concerning the defendant's mental fitness or competency. Based on these relevant facts the defendant was entitled to a hearing at this time as the court at this same time was duty bound to order such a hearing as to inquire into the defendant's mental fitness at this time, and it was at this time the courts responsibility to investigate these issues raised concerning the defendant's mental fitness or competency through "test" before resuming the pending litigation against the defendant, as is called for in ***St. V. Austad, 197 M 70, 641 P2d 1373 (1981)***. However as the defendant is ready to show to the court through relevant transcribed transcripts from the above entitled proceedings that no such hearing or tests were ever ordered by the court to investigate the issue raised by the defense counsel concerning the defendant's mental fitness or competency at this time nor at any other time relevant to these proceedings. Only a few hours after defense counsel raised these important and meaningful issues in which the court for reasons of its own did not investigate through a hearing *sue sponte* and test as to inquire if there is a good faith doubt as to the defendant's competency, instead the court excepted a plea of guilty from the defendant, all the while the court being aware from earlier advisement of defense counsel that the defendant was

not in all likelihood mentally fit or competent at this time to make this plea of guilty nor at this time did the defendant have any rational reason for making such an out of time and irrational plea. At this time the defendant was not himself and he was not accountable for his thoughts and actions due to the fact that at this time the defendant was at this time of entering his plea of not guilty to the court, mentally incompetent due to the fact that the defendant was at this time and had for three (3) consecutive days prior to this event been denied by Cascade County Jail authorities or their agents his prescribed psycho tropic medication "Nortriptyline" in which the defendant needs this prescribed medication to nullify the effects and symptoms of his mental illnesses as described and prescribed by prudent medical professionals.

For these aforementioned reasons the defendant at the time of entering his plea of guilty to the court had absolutely no rational or factual understanding of the proceedings against him due to his mental incompetence , ***see, St. V. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987) and followed in, St. V. Santos, 273 M 125, 902 P2d 510, 52 St. Rep. 865 (1995)***. Due to these facts the validity of the defendant's guilty plea must be prudently questioned for given the defendant's mental state of mind at the time he made his guilty plea it can only be determined that such a plea was not made voluntarily do to the fact that this plea of guilty is certainly not the same plea if any that the defendant would have or would not have made had he been receiving his prescribed medication at this time, nor was the plea of guilty made as an intelligent choice among the alternative courses of action open to the defendant do to the very same above said reasons. Prior to the court accepting the defendant's plea of guilty the court should have examined in depth these facts and as to what rational bases if any can be found, as to what the defendant was using in his reasoning for making such an untimely and irrational plea. Which the very plea itself shows irrational behavior and thinking on the defendant's part. Such an examination into these

questions by the court prior to accepting the defendant's guilty was mandatory because the record required it not only because of the defendant's long history of mental illnesses to which the court should have previously been aware of, but because defense counsel raised the issue to the court questioning the defendant's mental fitness or competency hours prior to the defendant making his irrational and involuntary plea of guilty to the sentencing court, ***see, St. V. Lance, 201 M 30, 651 P2d 1003, 39 St. Rep. 1932 (1982); Yother V. State, 182 M 351, 597 P2d 79 (1979).***

The voluntariness of a guilty plea in ***St. V. Griffen, 167 M 11, 535 P2d 498 (1975)*** sets a standard that the defendant's sentencing court did not in theory recognize prior to accepting the defendant's plea of guilty, such as "voluntariness", "full understanding of the charge, with full appreciation of his constitutional rights and possible penalty". Despite how things might or may have appeared at the time the court accepted the defendant's plea of guilty the standard set forth in *St. V. Griffen* was not met from a point of adequacy or prudence do to the defendant's long history of mental illness to which the court should have been previously well aware of and do to the mental and psychological disorders the defendant was currently suffering the effects of at the time of pleading guilty and also at all other relevant times prior to the defendant pleading guilty in the above entitled matter for reasons already aforementioned.

Conclusion

The defendant, Russell G. Garner, realizes that the burden of proof is placed upon himself to show this Honorable Court that through a factual presentation of relevant documents and affidavits as well as with his own oral testimony that the withdraw of his guilty plea in the above entitled matter should be allowed. This is also concurred in, ***St. V. McAllister, 96 Mont. [348].*** The defendant also realizes that there is no hard and fast rule that can be laid down as to what showing the defendant must make to move the court, but each case must depend on its own facts,

St. V. Nance, (120 Mont. 152) as the defendant's case most certainly does.

The defendant states that this Honorable Court should grant his motion to change his guilty plea to a plea of not guilty, which would be in accordance with, *St. V. Nichols, 46 Mont. 470, 128 P. 543; State Ex-Rel. Foot 81 Mont. 495, 263 P. 979* as well as, *St. V. Schaff, 1998 Mt 104, ___ M ___, ___ P2d ___, 55 St. Rep. 396 (1998)* based on all the aforementioned facts, that are for already said reasons only now being brought forth into the light for this Honorable Court to examine.

WHEREFORE on its face, then, this is a meritorious case, and based on the foregoing reasons, this Honorable Court should grant the defendant's motion to withdraw plea of guilty and insert a plea of not guilty and schedule a hearing in a timely manner in which the defendant can appear before this Honorable Court and give oral testimony supported by relevant official documentation and other facts that will further support the defendant's motion in this matter.

Respectfully submitted on this 22 day of OCT, 1999.

Russell G. Garner

Russell G. Garner, A.O.#23568
Glendive Regional Prison.
440 Colorado Blvd.
Glendive, Montana, 59330.

NOTARY PUBLIC

STATE OF MONTANA)
) ss:
COUNTY OF DAWSON)

Sworn to before me on this 22 day of October, 1999.

(S E A L)

Notary Public

NOTARY PUBLIC for the State of Montana
Residing at Glendive, Montana
My Commission Expires January 6, 2002

CERTIFICATE OF SERVICE

I Russell G. Garner, the defendant in the above entitled matter do hereby certify that on the 22 day of OCT, 1999, I mailed a true and correct copy of the foregoing, *"MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND INSERT A PLEA OF NOT GUILTY"* by the U.S. Mail, First Class Postage, addresses to the following:

Julie Macek, Deputy County Attorney.
Cascade County Attorneys Office.
121 4th Street North.
Great Falls, Montana, 59401.

Russell G. Garner.

Russell G. Garner.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

STATE OF MONTANA, Plaintiff, vs. RUSSELL GLEN GARNER, Defendant.	)	Cause No. CDC-95-247 **ORDER RE DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY AND INSERT A PLEA OF NOT GUILTY**

This matter is before the court on Defendant's pro se Motion to Withdraw Plea of Guilty and Insert a Plea of Not Guilty. The State is represented in this matter by Julie Macek. The parties have fully briefed the issue. Neither party having requested a hearing, this decision is made upon the briefs of the parties.

I. FACTS

An information was filed on June 16, 1995, charging defendant with felony theft and felony forgery. Defendant initially pled not guilty to both charges. Defendant's trial on these charges began on November 29, 1995. On November 30, 1995, following the State's case in chief and a denial of Defendant's motion for a directed verdict, Defendant informed the court that he wished to withdraw his not guilty plea and enter a guilty plea to the charges. A hearing was held regarding the change of plea on the same date. Defendant's guilty plea was accepted and entered. Defendant was sentenced on January 23, 1996 to 10 years with 5 suspended on the theft charge, to 10 years for forgery, and to 10 years as a persistent felony offender.

Following sentencing, Defendant was served with a Notice of Right to Apply for Sentence Review. Defendant did not file for

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(111)

sentence review, but rather filed a Motion to Correct Sentence on May 6, 1996. This motion was subsequently re-designated to be a Motion to Correct Sentence and Petition for Post-Conviction Relief, and filed on September 23, 1996. Defendant's motion was based upon an asserted violation of the notice requirement of the State's intent to seek treatment of Defendant as a persistent felony offender. The petition for post-conviction relief and motion to correct sentence was denied on January 21, 1997.

On November 5, 1998, Defendant filed a Motion to Take an Out of Time Appeal with the Montana Supreme Court, in order to appeal the court's decision regarding his motion to correct his sentence and for post-conviction relief. Defendant filed this motion asserting that he had not been informed of his right to appeal the court's decision and that a Notice of Entry of Judgment should have been filed by the State in order to begin the running of the 60 day time period in which a notice of appeal must be filed. The matter was remanded to the district court for hearing and so that findings of fact and conclusions of law could be made upon which the Supreme Court could then decide the issues on appeal. Subsequently, the Supreme Court denied Defendant's motion for an out of time appeal.

Defendant filed the instant motion to withdraw his guilty plea and enter a plea of not guilty on November 15, 1999. As a basis for this motion, Defendant now asserts that he was denied prescribed psycho-tropic medication for three days preceeding his trial and change of plea. Therefore, Defendant asserts that he

was incompetent to enter a guilty plea and such plea must now be deemed to have been involuntary. Defendant further asserts that the issue of his alleged incompetence was raised to the court just prior to trial by Defendant's court appointed counsel, and that the court failed to, sua sponte, order a hearing on the issue.

II. ANALYSIS

The standards applicable to petitions by criminal defendants for withdrawal of guilty pleas is well-settled in Montana law.

First, Article II, Sections 24 and 26 of the Montana Constitution protect the right of criminal defendants to trial by jury. Second, a court may only accept a plea of guilty by first determining that the defendant understands the charge and has voluntarily entered the guilty plea. §46-12-204(2), MCA. The guilty plea may be accepted when the defendant enters a guilty plea in open court and the court has informed the defendant of the consequences a guilty plea and of the maximum penalty which may be imposed. §46-16-105(1), MCA. Further, a court has authority to permit the withdrawal of a guilty plea at any time upon good cause shown. §46-16-105(2). These constitutional and statutory safeguards ensure that the fundamental right to a trial by jury may be waived by a criminal defendant only if such waiver is knowingly and voluntarily made.

A guilty plea is deemed to be involuntary where it appears that "the defendant was laboring under such a strong inducement, fundamental mistake, or serious mental condition that the

possibility exists he may have plead guilty to a crime of which he is innocent." State v. Huttinger, 182 Mont. 50, 55, 595 P.2d 363 (1979) (Citations omitted). If there is a doubt that a plea was voluntarily entered, the doubt should be resolved in favor of a trial on the merits. Id. 182 Mont. at 55 (Citations omitted).

There are three issues to be considered when a defendant attempts to withdraw a guilty plea:

> (1) the adequacy of the interrogation by the District Court of the defendant at the entry of the guilty plea as to defendant's understanding of hte consequences of his plea;
> (2) the promptness with which the defendant attempts to withdraw the prior plea; and
> (3) the fact that the defendant's plea was apparently the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge.

State v. Nelson, 184 Mont. 491, 496, 603 P.2d 1050 (1979) (Citing Huttinger, supra).

The mental incompetence of a criminal defendant will render a guilty plea involuntary, and due process requires that a court hold a hearing whenever evidence is presented raising a sufficient doubt about an accused's mental competency to stand trial. See State v. Bartlett, 282 Mont. 114, 935 P.2d 1114 (1997). Therefore, this court will first determine, from the record, whether "sufficient doubt" of Defendant's mental competency was raised to have required the court to hold a competency hearing. If not, this court will then address whether Defendant's guilty plea was voluntarily entered, pursuant to the factors set forth above.

Was There Evidence Raising a Sufficient Doubt of Defendant's Competence?

The assertion that Defendant's competence was at issue based on lack of prescription medication at the time of his trial arose within a context of a strained relationship between Defendant and his court appointed counsel, Larry LaFountain. During the trial on November 29, 1995, Defendant determined that he wanted to represent himself. A hearing was held outside the presence of the jury to address Defendant's request and other issues. At that time, Mr. LaFountain indicated to the court that there was a medication issue to be addressed prior to continuing trial. The transcript of all discussion regarding Defendant's lack of medication follows:

> MR. LAFOUNTAIN: Second point is, I would like to put Mr. Garner on the stand to question him about his medication situation. I've had difficulty dealing with him in the past and part of it has had to do with some, I feel with some type of a problem he's been medicated for. Or maybe this isn't the appropriate time. But basically, he was brought down here from Montana State Prison without his medications. I was told by the jail at one point he went into a sweat. And --
>
> THE COURT: Have you arranged --
>
> MR. LAFOUNTAIN: When he first came down he was more cooperative than he'd ever been. He was under the influence of his medication.
>
> THE DEFENDANT: You are an idiot.
>
> THE COURT: Mr. Garner, you're out of order.
>
> THE DEFENDANT: I've had enough. Go ahead and send me back to jail. He has no rapport with these people over here. These people up here sit and laugh at him. This guy has asked me if I would like more paper to write things down. This is a joke.
>
> THE COURT: Mr. Garner, sit down. You're going to be in order or you're going to be shackled. Now, I don't want anymore outbursts. Mr. LaFountain, what kind of medication are you talking about here?
>
> THE DEFENDANT: I'm on antidepressants. This has nothing to do about being depressed. It has to do with being very angry about that man's incompetence if

nothing less.

THE COURT: Ms. Macek, any comment?

MS. MACEK: No, Your Honor. Mr. Garner's indicated what medication he's on. The fact is that he feels that he's prepared to proceed and I would suggest we get the show on the road.

From the excerpted discussion above, it is clear that the issue of Defendant's competence, per se, was not raised to the court. Rather, Mr. LaFountain's concerns seemed to be more related to his difficulty in maintaining a peaceful relationship with his client. Defendant himself indicated that his depression was not a basis for the strained relationship between he and Mr. LaFountain.

There was no information before the court regarding prior conduct of Defendant which would impugn his competence--his ability to understand the proceedings and assist in his own defense. In fact, ultimately, the court determined that Defendant would be allowed to present his own defense with Mr. LaFountain as stand-by counsel. This court finds that there was not evidence before the court which raised a "sufficient doubt" of Defendant's competence to require a competency hearing. Therefore, Defendant's due process rights were not violated by the court's failure to hold such hearing.

Was the Guilty Plea Entered Voluntarily?

The first factor in determining the voluntariness of Defendant's guilty plea is the adequacy of the interrogation by the District Court of the Defendant as to his understanding of the consequences of his plea. A trial judge's interrogation is is sufficient if the judge:

> ...examines the defendant, finds him to be competent, and determines from him that his plea of guilty is voluntary, he understands the charge and his possible punishment, he is not acting under the influence of drugs or alcohol, he admits his counsel is competent and he has been well advised, and he declares in open court the facts upon which his guilt is based.

State v. Walker, 220 Mont. 70, 72, 712 P.2d 1348 (1986); citing State v. Lewis, 177 Mont. 474, 485, 582 P.2d 346, 352 (1978).

The hearing on Defendant's motion to withdraw his not guilty plea and enter a guilty plea occurred on November 30, 1995, the second day of trial. The entire colloquy is set forth below:

> THE COURT: Would you come forward and take the stand. I want to ask you some questions, please.
> THE COURT: All right. You're still under oath, please.
> THE DEFENDANT: Yes.
> THE COURT: You, in the nature of the charges here, you're charged with Count 1, theft, and Count 2, forgery?
> THE DEFENDANT: Yes.
> THE COURT: And you understand the penalty for those--we've been through those?
> THE DEFENDANT: Yes.
> THE COURT: And you understand that you're also, because you've been determined a habitual offender I think is the term, that there are additional penalties, two to one hundred years that would be consecutive?
> THE DEFENDANT: Yes.
> THE COURT: And you are aware in the one case the fine I think for theft is ten years maximum penalty with a $50,000 fine or both?
> THE DEFENDANT: Yes.
> THE COURT: And for forgery it's 20 years maximum with a $50,000 fine or both?
> THE DEFENDANT: Yes.
> THE COURT: And, of course, the fine can be less than $50,000 in both cases. You understand that?
> THE DEFENDANT: Yes.
> THE COURT: All right. You understand that under certain circumstances restitution could be ordered in this case?
> THE DEFENDANT: Yes.
> THE COURT: All right. And you have the right to be represented by an attorney?
> THE DEFENDANT: Yes.
> THE COURT: And you've had an attorney appointed for you?

THE DEFENDANT: Yes.
THE COURT: And you've elected not to have that attorney represent you, but he's been there as standby counsel for you?
THE DEFENDANT: Yes. Yes.
THE COURT: And you understand that you have the right to plead not guilty and to persist in that not guilty plea as you've done?
THE DEFENDANT: Yes.
THE COURT: And to have the matter conducted in a trial before the jury?
THE DEFENDANT: Yes.
THE COURT: And you'd have the right to confront and cross-examine witnesses. And you don't have to testify against yourself in anyway.
THE DEFENDANT: Yes.
THE COURT: You understand that?
THE DEFENDANT: Yes.
THE COURT: And you have the right to have witnesses brought in to court and to have them subpoenaed fi they don't wish to testify on your behalf.
THE DEFENDANT: Yes.
THE COURT: And you have the right to waive the trial by pleading guilty. You understand that?
THE DEFENDANT: Yes.
THE COURT: But if you waive -- if you do plead gulty then you give up all of those rights.
THE DEFENDANT. Yes.
THE COURT: Are you an U.S. citizen.
THE DEFENDANT: Yes.
THE COURT: All right. Is your decision to plead guilty based on any discussions between you and the prosecution? Is there any agreement here?
THE DEFENDANT: No.
THE COURT: Is it your voluntary wish to enter into this guily plea at this time?
THE DEFENDANT: Yes.
THE COURT: And to have the court enter the sentence that is appropriate under this circumstance?
THE DEFENDANT: Yes.
THE COURT: Are you suffering from any mental or emotional impairment or defect that would prevent you from understanding what you are doing, do you think?
THE DEFENDANT: No.
THE COURT: You have full use of your capacities here today?
THE DEFENDANT: Yeah.
THE COURT: You haven't used any drugs or alcohol today?
THE DEFENDANT: No.
THE COURT: And it's your, I guess I'd ask you at

this point whether you think your attorney is competent and whether you;ve been well advised at this point?

THE DEFENDANT: Yes.

THE COURT: Do you believe, that at this point?

THE DEFENDANT: Yes.

MR. LAFOUNTAIN: Your Honor, I can't allow that. That's not what he's said all along.

THE COURT: And I am concerned by that, Mr. Garner, because you have taken the position that you have not been well advised at this point. And is that what you believe?

THE DEFENDANT: No. I believe that he's done just fine.

THE COURT: Despite the fact that you have earlier said that you weren't satisfied?

THE DEFENDANT: Yes.

THE COURT: All right. All right. I have to ask you then to give me the factual basis for this plea. And in order to do that you're going to have to tell me the facts that constitute the offense of theft and the offense of forgery. So I need you to tell me what happened here that would support this guilty plea.

THE DEFENDANT: On the forgery, I forged a check to cash it. And I left.

THE COURT: Did you sign the check yourself?

THE DEFENDANT: Yes, I did.

THE COURT: And you knew that you didn't have authority to do that?

THE DEFENDANT: Yes, I did.

THE COURT: And did you do that on or about May 30th of 1995?

THE DEFENDANT: Yes.

THE COURT: And did you do that in Great Falls, Cascade County, Montana?

THE DEFENDANT: Yes.

THE COURT: And with respect to forgery? --I'm sorry, theft?

THE DEFENDANT: Theft? I was going through Missoula and I found a truck and stole it.

THE COURT: Where did you find the truck?

THE DEFENDANT: In Missoula.

THE COURT: Whereabouts? Do you recall?

THE DEFENDANT: No, I don't.

THE COURT: Did you have the authority of the owner of the truck to take that vehicle?

THE DEFENDANT: No.

THE COURT: Did you take it intending to deprive him of the use of that vehicle?

THE DEFENDANT: Yes, I did.

THE COURT: And did that occur prior to May 30th, 1995?

THE DEFENDANT: Yes.

THE COURT: And did you have it in your possession on May 30th, 1995?
THE DEFENDANT: Yes.
THE COURT: Did it happen in -- did you have it in your possession in Cascade County, Montana on May 30th, 1995?
THE DEFENDANT: Yes. Yes, I did.
THE COURT: All right. And there is no plea agreement here.
THE DEFENDANT: Yes, sir.
THE COURT: All right, Miss Macek, do you have any questions?
MS. MACEK: Yes. Mr. Garner, as far as the pickup is concerned, would you agree that it was a 1993 pickup and was worth more than $500?
THE DEFENDANT: Yes.
MS. MACEK: And as far as the check is concerned, you would agree that that check belonged to someone else -- Mr. Frost?
THE DEFENDANT: Yes.
MS. MACEK: And that you did not have any permission to sign his name on that check?
THE DEFENDANT: Yes.
MS. MACEK: And that you took that check to Easy Money Check Cashing and delivered it to them?
THE DEFENDANT: Yes.
MS. MACEK: And that you did os with the purpose to defraud them and to get money in return?
THE DEFENDANT: Yes.
MS. MACEK: And would you agree that the check was for an amount of $1,023.26?
THE DEFENDANT: Yes.
MS. MACEK: I'm sorry, but it was hard for me to hear you. You indicated to the judge that you, in fact, did take the pickup in Missoula?
THE DEFENDANT: Yes.
MS. MACEK: And did not have the authority to have that pickup?
THE DEFENDANT: Correct.
MS. MACEK: Mr. Garner, you understand as the Judge told you, that you have the right to continue this trial and to go ahead and see what the jury renders as far as a verdict?
THE DEFENDANT: No thanks.
MS. MACEK: Okay, but you understand?
THE DEFENDANT: Yeah.
MS. MACEK: You've got the right to do that?
THE DEFENDANT: Yes.
MS. MACEK: And you understand that you've got the right to -- during the course of this trial, all the rights that you had -- that you would be giving up all of those rights?

THE DEFENDANT: Yes.

MS. MACEK: Do you understand that if you plead guilty here today that you will have a difficult time in appealing your decision to plead guilty? In other words, you're taking away a possible appeal?

THE DEFENDANT: Yes. I don't want to appeal.

MS. MACEK: And do you understand that when you plead guilty here today you can't change your mind tomorrow or a week from now or a couple of months from now, that once you make this decision it's very difficult to go back on?

THE DEFENDANT: Yes.

MS. MACEK: And you feel that this is a decision that's in your best interest?

THE DEFENDANT: Yes.

MS. MACEK: And you feel -- do you feel like you understand what your options are right now?

THE DEFENDANT: Yes.

MS. MACEK: Do you feel that you understand that you can go forward and see what a jury does as far as this case is concerned?

THE DEFENDANT: Yes, I understand that.

MS. MACEK: And you don't want to go forward?

THE DEFENDANT: No.

MS. MACEK: Why don't you want to go forward?

THE DEFENDANT: Because I'm guilty.

MS. MACEK: And do you understand that there's no plea agreement in this matter?

THE DEFENDANT: Yes.

MS. MACEK: Do you understand that pursuant to the statute I could as for up to the maximum penalty for the charge of felony theft, which is ten years incarceration and $50,000 fine?

THE DEFENDANT: I believe its 20 years for forgery.

MS. MACEK: I'm talking about for the theft.

THE DEFENDANT: Yes, I understand.

MS. MACEK: And for the forgery you understand I could ask for 20 years and up to a $50,000 fine?

THE DEFENDANT: Yes, I do.

MS. MACEK: And do you understand that we could also ask that that time run consecutive to each other?

THE DEFENDANT: Yes.

MS. MACEK: And that I could ask that that time run consecutive to any sentence that you are serving right now?

THE DEFENDANT: Yes.

MS. MACEK: And you understand that you've previously been declared a persistent felony offender. And if the court feels that I have provided him the required documentation or the statute to show that that's correct and that that statute applies, that you

could be responsible or be held and imprisoned for an additional period of time from ten to 100 years for the fact of being a previously declared persistent felony offender?

THE DEFENDANT: Yes, I do.

MS. MACEK: And you understand that the court can actually use that hundred years as a replacement for the maximum penalties that are provided for the underlying charge of felony theft?

THE DEFENDANT: Yes.

MS. MACEK: And for forgery?

THE DEFENDANT: Yes.

MS. MACEK: You have previously stated that you felt that you received appropriate representation in this matter. Can you tell us why you can say that now based on what you've been talking about all day long today?

THE DEFENDANT: He did the best he could.

MS. MACEK: And do you believe that he attempted to do what was in your best interest?

THE DEFENDANT: Yes, I do.

MS. MACEK: Do you believe that he gave you information about what your options were?

THE DEFENDANT: Yes.

MS. MACEK: Did he present to you previous plea agreements that we had offered?

THE DEFENDANT: Yes.

MS. MACEK: And you rejected those prior to today?

THE DEFENDANT: Yes.

MS. MACEK: Do you also understand that the court has the authority to limit your ability for parole?

THE DEFENDANT: Yes.

MS. MACEK: And that the court could also make a determination under the appropriate statutory definitions that you would be a dangerous offender?

THE DEFENDANT: Yes.

MS. MACEK: And that both of those things could require that you spend more time in prison?

THE DEFENDANT: Yes.

MS. MACEK: And that is a decision that you feel comfortable with?

THE DEFENDANT: Yes.

MS. MACEK: This is something that you are doing voluntarily?

THE DEFENDANT: Yes.

MS. MACEK: Has anyone encouraged you to do this?

THE DEFENDANT: No.

MS. MACEK: Has anyone made any promises to you if you plead guilty today?

THE DEFENDANT: Nope.

MS. MACEK: Has anyone forced you to plead guilty today?

THE DEFENDANT: No.
MS. MACEK: In fact, have several people advised you of the ramifications if you plead guilty?
THE DEFENDANT: Yes.
MS. MACEK: I don't have any other questions.
THE COURT: Knowing all of the things that you know now, Mr. Garner, about what can happen here, is it still your intent to go forward and plead guilty?
THE DEFENDANT: Yes.

As is clear from the colloquy, Defendant was fully informed of his right to persist in his not guilty plea. He was also fully informed, repeatedly, what the ramifications of pleading guilty to the charges could be, including the potential prison sentences and fines on each charge, the potential sentence as a persistent felony offender, the potential loss of appeal rights, and the fact that the court could designate him as a dangerous offender. Further, Defendant admitted committing both offenses and admitted the specific facts of each offense. Defendant also testified that Mr. LaFountain was competent and represented him adequately, notwithstanding the allegations of ineffectiveness of counsel earlier in trial.

Finally, with regard to the specific basis for post-conviction relief asserted by Defendant, this court finds that Judge Goff specifically questioned Defendant regarding his competence. Defendant fully denied suffering from any mental or emotional impairment or defect that would prevent him from understanding what he was doing. Defendant did not raise the issue that his competence might be compromised based on his not having had his antidepressant medication for three days prior to trial. As already discussed, when the issue was raised by Mr.

LaFountain, Defendant adamantly denied that his behavior was influenced by his lack of medication.

The second factor in evaluating Defendant's petition to withdraw his guilty plea is the promptness with which the defendant attempts to withdraw the prior plea. In this case, Defendant entered his guilty plea on November 30, 1995, and filed the current motion for post-conviction relief on November 15, 1999, just less than four years later. In the meantime, Defendant had filed another motion for post-conviction relief and then an out of time appeal on this court's denial of that motion. A delay of four years, together with Defendant's prior motions attempting to relieve himself of his guilty plea and resulting punishment in this matter, can only lead to the conclusion that Defendant's motion does not satisfy the requirement of promptness either.

The final factor to consider is whether or not Defendant's entry of a guilty plea is the result of a plea bargain. This factor is considered because the Montana Supreme Court has stated that it "will not lend its assistance to an accused criminal in escaping the obligations of his agreement after accepting the benefits thereof." State v. Radi, 250 Mont. 155, 162, 818 P.2d 1203 (1991). If the guilty plea is not the result of a plea bargain, this factor is not pertinent. See State v. Long, 227 Mont. 199, 202, 738 P.2d 487 (1987).

As is clear from the above colloquy, Defendant's decision to withdraw his not guilty plea and enter a guilty plea was not the

result of a plea bargain. Therefore, this court considers only factors (1) and (2).

III. CONCLUSION

Based on the foregoing analysis, this court finds that Defendant was adequately interrogated regarding his understanding of the charges against him, his potential punishments, and the voluntariness of his withdrawal of his not guilty plea. This court further finds that the evidence before the court at the time did not raise a sufficient doubt of Defendant's competence to require a competency hearing. All evidence before this court indicates that Defendant was competently represented, fully informed of the ramifications of his change of plea, and competent to enter a plea of guilty to the charges against him. For all of these reasons, there is no legal basis upon which to now let Defendant withdraw his guilty plea and insert a plea of not guilty.

IT IS HEREBY ORDERED that Defendant's Motion to Withdraw Plea of Guilty and Insert a Plea of Not Guilty is DENIED.

DATED this 24th day of January, 2000.

Kenneth R. Neill, District Court Judge

cc: Defendant
Julie Macek